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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 276

A. C. BECKEN CO., AN ILLINOIS CORPORATION,
Cross-Petitioner,

vs.

THE GEMEX CORPORATION, A NEW JERSEY CORPORATION,
Cross-Respondent

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LORENTZ B. KNOBEL,
MARSHALL PATNER,
Attorneys for Cross-Petitioner.

DIXON, MORSE, KNOBEL & HOLMES,
38 South Dearborn Street,
Chicago 3, Illinois.

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

A. C. Becken Co., plaintiff below, cross-petitioner, asks this Court to review the judgment of the Court of Appeals for the Seventh Circuit on the second appeal in this case.

In the first appeal the Court of Appeals held the Gemex Corporation liable for violation of the antitrust laws, and reversed and remanded, with instructions to complete the proceedings on the amount of damages and fees to be awarded Becken, 272 F. 2d 1. Gemex petitioned for certiorari and the petition was denied, 362 U. S. 962. On remand, the District Court entered judgment for damages and fees and on cross appeals, the Court of Appeals affirmed the damage award, and reversed and remanded with instruc-

tions to reduce the award for fees. Judgment was entered February 28, 1963, and Becken's petition for rehearing *en banc* was denied April 9, 1963. Gemex, as petitioner, has asked for certiorari to review the amount of damages awarded, petition No. 1122, October Term, 1962. This cross-petition is presented for review of the standards of proof to be applied to determine the amount of damage after a wrongful refusal to deal, and on what is a reasonable award for attorney's fees, both under 15 U. S. C. A. Section 15.

OPINIONS BELOW

The opinion of the Court of Appeals in the first appeal is reported at 272 F. 2d 1 (Appendix B). Gemex's petition for certiorari was denied at 362 U. S. 962. The findings of fact and conclusions of law of the District Court on damages are reported in 199 F. Supp. 554 (Appendix C), and on fees in 204 F. Supp. 28 (Appendix 360-363). The opinion of the Court of Appeals on which review is sought here is reported at 314 F. 2d 839 (Appendix D), and Gemex, defendant below, petitioned for certiorari, petition number 1122, October Term, 1962. This is a cross-petition by Becken, plaintiff below. The opinions below appear in A through F of the Appendix to the Gemex petition, 1122, and the findings and conclusions of the trial court on fees appears in Appendix pages 360-363.

THE RECORD

Gemex, cross-respondent, filed certified copies of the appendix and exhibit volume in the proceedings below. The appendix from the first appeal, and the joint appendix, from the second appeal, are numbered consecutively, and any record reference will be to the appropriate page in the appendix.

JURISDICTION.

The judgment of the Court of Appeals was entered February 28, 1963 (Appendix E), and the petition by Becken for rehearing *in banc* was denied April 9, 1963 (Appendix F).

Jurisdiction of this Court is invoked under the provisions of Title 28 U. S. C. A. Section 1254(1).

STATUTES.

The damage award and the award for fees were both made pursuant to the provisions of Title 15 U. S. C. A. Section 15 (Appendix A), after Gemex was found guilty of violating the anti-trust laws.

STATEMENT.

On August 2, 1956, Gemex, a manufacturer, refused to continue to sell watchbands to Becken, a wholesale jewelry distributor. Becken filed suit November 23, 1956, and alleged that the refusal was a violation of Section 1 of the Sherman Act, 15 U. S. C. A. Section 1, and asked for damages for continuing harm (Appendix 5, Par. 8(b)). At the trial, as part of its prima facie case, Becken projected anticipated lost profits and proved actual damages of $56,007.04.[1] Becken's proof was made by projecting anticipated lost profits. The projections were based on 43 years of experience in the field, and the fact that Becken had a national sales force that had been selling the Gemex prior to the cutoff (272 F. 2d 1, 3-5; Appendix B, 6a-9a). However, on March 24, 1959, the trial court entered findings of fact and conclusions of law and dismissed the complaint.

1. On remand this amount of Becken's proof of actual damage was amended by leave of court to $57,007.04 (Appendix 202-203, 292-294, 304).

There had not been any pre-trial motion for summary judgment, but at the close of Becken's case in chief, Gemex moved for judgment, and the trial court dismissed the complaint. Prior to trial, Gemex elected not to make any discovery whatsoever on the damage Becken alleged.

On appeal, on November 27, 1959, the Court of Appeals reversed and held that Gemex had violated Section 1. The Court (Appendix B, 9a) said that although judgment for plaintiff could have been entered, in the ends of justice, Gemex should have the opportunity to put in its proof on the amount of damage. This was to be against Becken's proof already in the record on the amount of damage, and Becken was to be permitted to offer rebuttal evidence, and the Court remanded with such instructions. The Court also directed the trial court to assess a reasonable amount for attorney's fees, under Section 15 of the Act. As set out above, Gemex petitioned for certiorari and the petition was denied on 362 U. S. 962.

On remand, the trial was completed. Four years had elapsed since Gemex refused to sell to Becken. Gemex contended that it could take advantage of the passage of time by offering proof of a decline in the general watchband market to overcome Becken's projected anticipated losses. Becken objected to this line of evidence because its proof was based on past experience, and in its success in the market because of its own national sales force. The trial court discounted all of this line of proof, except for general market conditions not attributable to Gemex (Appendix C, 22a, Concl. 7). This general proof, however, was one basis the trial court used to reduce damages. Yet Gemex also introduced Becken's sales records for the four years after the illegal cutoff, but these records showed an increase in sales on major lines of watchbands. These records were obtained when Gemex served Becken with

interrogatories after the case was reversed on the first appeal.

After the case was reversed, Gemex also asked for Becken's sales invoices for sales prior to the original trial. However, Becken had a long established business practice of destroying sales invoices after two years, and when no discovery was made prior to commencement of trial, this material was destroyed, but only after the original portion of the trial was completed. On rebuttal Becken substantiated that its sales on major lines of watchbands increased after the cutoff date, and this actual sales experience for four-years after the cutoff date substantiated the accuracy of the original projections. As an alternative to the market defense, Gemex attempted to show a valid reoffer to sell to mitigate damages, but this line of proof was rejected on the evidence (Appendix C, 23a, Concl. 11, 12).

On September 29, 1961, the trial court entered findings and conclusions, and determined that Becken's actual damages were only $24,764.68. The court used the same five-year period that Becken had used, but made its own computation on what sales should have been anticipated. The court found that any fall in the general market, not attributable to the violation could be used to reduce damage. The court disregarded the uncontroverted fact of Becken's own sales increases during the period. The trial court made additional deductions from Becken's damages for additional anticipated sales commissions against anticipated sales (Appendix C).

The trial court was affirmed after cross-appeals were filed from this judgment. The Court of Appeals did not deal with the question of what proof was proper after a refusal to deal, or with Becken's contention that the Court had committed plain error when it caused double deductions for sales commissions, although the fact of a double

deduction was undisputed. The Court said Becken could not complain since it had permitted invoices to be destroyed *pendente lite*.

The trial court, after a hearing, also entered judgment for $25,000.00 as a reasonable award for attorney's fees. Becken provided competent proof in support of this award, covering counsel's responsibility in advising Becken to withdraw from an active market rather than act illegally with Becken, the steps in preparation, trial, and appeal, and the successful result, the uniqueness of the cause of action, the standards of counsel, and the court's awareness of the conferences and appearances in the case. Becken's case was supported by testimony of an expert witness and Gemex admitted his qualifications. Gemex did not see fit to put in any proof whatsoever. However, the Court of Appeals summarily reduced this award to $17,500.00 on the cross-appeal (Appendix D).

QUESTIONS PRESENTED

Where defendant's violation of the anti-trust laws for refusal to sell to plaintiff, and plaintiff's right to damages under the provisions of 15 U. S. C. A. Section 15, are established and

(1) (a) where proof of damage after an illegal cutoff is made by projections of anticipated lost profits, and corroborated by actual sales experience after the cutoff, is it plain error to reduce the amount of damage solely on the basis of general market conditions;

(b) where projected lost profits are made after deduction of sales and overhead expenses, is it plain error for the court to reduce such profits by double deductions for such sales commissions, on the ground that records were

not preserved, when the double deduction is uncontroverted, and there is no showing that the record would show otherwise;

(2) Can the Court of Appeals summarily reduce an award for attorney's fees, which the award is supported by uncontroverted evidence, and can the award be reduced unless the award is clearly erroneous under F. R. C. P. 52 (a)

REASONS FOR GRANTING THE WRIT

Title 15 U. S. C. A. Section 15 provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti trust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Appendix A.)

This case raises the question of the standards of proof to be applied on the amount of damage sustained in case of an illegal refusal to deal, and the standards to be applied to determine the reasonable amount to be allowed for fees as part of damages in anti trust cases.

This Court confirmed that treble damages could be recovered for violation of the anti trust laws, 15 U. S. C. A. Section 15, after a refusal to deal, in *Eastern v. Lorain*, 1915, 235 U. S. 592. However, this Court has never considered the standards of proof to be applied to determine the actual amount of such damages, and the Court has never considered the standards to be applied to determine what is a reasonable award for attorney's fees, under Section 15 of the statute.

The Amount of Damage

The intent of Congress is clear: damage sustained by violation of anything forbidden in the anti-trust laws shall be recovered. In the present case damage of $57,007.03 was proved by projection based on competent evidence of past sales experience and ability. In the proceedings on remand, this proof was corroborated by uncontroverted proof of actual sales after the cutoff. This opinion below permits general market conditions to overcome this proof. The opinion is contrary to the policy of Section 15 of the statute. The opinion also permits duplicate deductions for sales commissioners to reduce plaintiff's award. The fact that the deductions are duplications was uncontroverted. The opinion below permitted this plain error by misapprehending a doctrine on destruction of records and has permitted the defendant who caused harm to escape the full measure of its liability.

This Court has never reviewed the standards of proof to be supplied in a cutoff or refusal to deal case. Review should be granted in this case to set standards that comply with the policy of Section 15 of the statute.

The Award for Attorney's Fees

The standards to be applied to determine the reasonable amount to be awarded as attorney's fees under 15 U. S. C. A. Section 15, has significance beyond the interests of the litigants in this case, and the standards applied in this case do not follow the standards applied in other circuits.

Congress established the fee award as a part of damage to the successful anti-trust litigant. The standards to be applied to determine the amount of the award will therefore be significant in every civil damage action under the

anti-trust laws. This Court should grant review on this question because of the importance of legislative policy expressed in Section 15 of the statute, to resolve any conflict in the circuits, and to set standards to be applied in all future civil damage anti-trust actions.

The trial court in this case applied six standards to determine the reasonable fee award (Appendix 360-363):

(a) The fact that the prevailing party did not have the benefit of any judgment or decree in a prior action;

(b) Counsel took on special responsibility in this case to advise the client to withdraw from an active market rather than enter into a conspiracy;

(c) The case was unique on liability under Section 7 of the Act, and there was complexity in dealing with the damage issue;

(d) Counsel devoted somewhat over 600 hours, and a reasonable rate during the time of suit was $50 per hour (or a greater total than the amount awarded by the trial court);

(e) The plaintiff was ultimately successful, and damages were awarded;

(f) The Court was aware of conferences, argument, and work necessary up to the time of final judgment, including each trial and appellate step in this case.

The evidence in this case was uncontroverted on each of these points. However, the Court of Appeals applied only two standards: The amount of actual damages awarded, and time of counsel, (and the latter was misapplied, as set out in point (d) above). In the same circuit, however, the Court awarded fees approximately equal to actual damages in *Clapper v. Original Tractor Cab Co.*,

7 Cir., 1959, 270 F. 2d 616, at 628, and the successful litigant there had both a decree in a prior patent action with the parties to rely upon, and a settlement award with two of three defendants, and out of which counsel was presumably paid. The fee award approximated damages in *Richfield Oil Corp.* v. *Karseal*, 9 Cir., 1959, 271 F. 2d 709, 711.

Trial and appellate steps necessary to establish liability were considered in *20th Century Fox Theatre Corp.*, 8 Cir., 1952, 194 F. 2d 846, and followed in *Cape Cod Cranberry* v. *National Cranberry*, D. C., Mass., 1954, 149 F. Supp. 242, 244. Time of counsel as well as steps necessary for recovery were carefully considered by Judge Holtzoff in *Webster Motor Car Co.* v. *Packard Motor Car Co.*, 1955 D. C. C., 166 F. Supp. 865 (reversed on liability, 243 F. 2d 418, certiorari denied, 355 U. S. 822), at page 866. In the circuit below, additional fees on appeal were awarded to the litigant who successfully defended an award in *American Cap Co.* v. *Latoga*, 7 Cir., 1930, 44 F. 2d 763, 772.

Fees were reduced in *Milwaukee Towing Co.* v. *La Crosse*, 7 Cir., 1951, 190 F. 2d 564, 565, 570, but only because of prior decrees in the cases in the same industry, without novel issues. The same result occurred in *20th Century Fox Film Corp.*, referred to above. The standards applied by the trial court in this case were outlined in *Neon Motor Freight, Inc.* v. *Eastern R. R. Pres. Conf.*, E. D. Pa., 1958, 166 F. Supp. 163, 168-169 (reversed on liability, after appeal, 365 U. S. 127). Here each standard was met by competent and uncontroverted proof. In the *Richfield* case, referred to above, at page 712, the court held a fee award subject to the provisions of Rule 52(a) of the Federal Rules of Civil Procedure. The Court of Appeals in this case, however, arbitrarily reduced the award, even though not clearly erroneous as required by this rule.

CONCLUSION

Cross-Petitioner therefore requests this Court to grant review of this case on the grounds set forth above.

Respectfully submitted,

LORENTZ B. KNOUFF,
MARSHALL PATNER,
38 South Dearborn Street,
Chicago 3, Illinois.

DIXON, MORSE, KNOUFF & HOLMES,
38 So. Dearborn,
Chicago 3, Illinois.

No. 265

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

A. C. BECKEN CO., an Illinois Corporation,
Respondent, Cross-Petitioner,

vs.

THE GEMEX CORPORATION,
a New Jersey Corporation,
Petitioner, Cross-Respondent.

BRIEF OF CROSS-RESPONDENT IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

EDWARD A. HAIGHT,
BRITTON A. DAVIS,
141 W. Jackson Blvd.,
Chicago 4, Illinois,
Attorneys for Petitioner,
Cross-Respondent.

August 8, 1963.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 265

A. C. BECKEN CO., an Illinois Corporation,
Respondent; Cross-Petitioner,

vs.

THE GEMEX CORPORATION,
a New Jersey Corporation,
Petitioner, Cross-Respondent.

BRIEF OF CROSS-RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court on the issue of damages are reported at 199 F. Supp. 544. The Opinion of the Court of Appeals is reported at 314 F.2d 839. A previous opinion of the Court of Appeals on the issue of liability appears at 272 F.2d 1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Cross-Petition.

STATEMENT

The history of this litigation and a summary of the damage issue and award of the Courts below are set forth in the Petition for Writ of Certiorari filed on May 23, 1962 by petitioner and cross-respondent, The Gemex Corporation.* Such Petition also contains an appendix setting forth pertinent findings of fact, conclusions of law and opinions of the Courts below, to which reference is herein made.

In its Cross-Petition for Writ of Certiorari, plaintiff and cross-petitioner, A. C. Becken Co., asks this Court to brings before it for review a decision of the Court of Appeals for the Seventh Circuit affirming a judgment of the District Court for the Northern District of Illinois awarding to cross-petitioner treble damages in the amount of $74,294.04. Cross-petitioner also challenges the reasonableness of the award to it by the Court of Appeals of attorney's fees in the amount of $17,500.00. Both of these awards were made subsequent to an adjudication that The Gemex Corporation's refusal to sell watchbands to cross-petitioner on August 2, 1956 constituted a violation of the anti-trust laws (Opinion, App. B to Petition).

Cross-petitioner's theory on the issue of damages is that Gemex's refusal, on August 2, 1956, to supply its watchbands to cross-petitioner subsequently deprived cross-petitioner of watchband sales and profits therefrom. The damages claimed by cross-petitioner, and awarded by the Courts below, purport to represent the loss of such *anticipated* profits.

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* Originally designated as No. 1122 in the October Term, 1962, this cause has been reassigned as No. 150 in the October Term, 1963.

Cross-petitioner's computation of its prospective losses of anticipated profits was based solely upon the opinion of one man, cross-petitioner's own president (App. 72-75, 95-102). This witness testified that, on the basis of his own estimates, his company's profits on Gemex watchbands would normally have been expected to increase by 50% in the first full year following the refusal to deal, by 33% and 25% in the next succeeding years, and by 15% in each of the final two years (Finding 13 *et seq.*, App. C to Petition). Cross-petitioner's president did not, however, discuss market potential as a basis for his opinion, but merely *assumed* the availability of a rapidly expanding market, sufficient to support the increased sales and profits as to which he postulated:

At the trial on the issue of damages, evidence was offered directly attacking cross-petitioner's primary assumption—that the available market for Gemex watchbands sold by cross-petitioner would have sufficiently increased in the five years following the refusal to deal to enable cross-petitioner to have realized increases of 50%, 33%, 25%, 15% and 15% respectively. To demonstrate the error in the opinion of cross-petitioner's president, evidence of actual market conditions during the period in question was introduced. This evidence shows that the available market for Gemex watchbands, as well as for watchbands in general sold by cross-petitioner, was declining throughout the period in question, not increasing as cross-petitioner's president optimistically assumed (See Ex. Vol., Defendant's Exhibits 1, 2, 8, 11 and 12).*

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* Cross-petitioner misleadingly asserts (Cross-Pet., p. 5) that its "actual sales experience for four years after the cutoff date substantiated the accuracy of the original projections", and refers to "Becken's own sales increases during the period." Although cross-petitioner's sales in several watchband line did expand slightly after the cutoff (while

Notwithstanding the uncontroverted evidence that the available market for Gemex watchbands was declining in the years following 1956, the Courts below accepted the opinion of cross-petitioner's president that cross-petitioner could reasonably have expected progressive yearly increases in profits from sales of Gemex watchbands during the period in question. To the extent, however, that cross-petitioner's president projected the increases in profits at rates of 50%, 33⅓%, 25%, 15% and 15% in the five years following the cutoff, the District Court rejected such opinion evidence, estimating on the basis of actual market conditions that the projected increases in profits would more reasonably approach 33⅓% the first year and 20%, 10%, 5% and 5% in the subsequent years.**

The District Court also found as a matter of fact that cross-petitioner had improperly taken into account in its computation certain commissions paid to salesmen on sales of Gemex watchbands. The trial court recomputed the deduction for sales commissions paid by cross-petitioner to correct this error (Set Findings 3-12, App. C to Petition).

Accordingly, cross-petitioner's original projection of its anticipated profits, as based solely upon the opinion of its

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* (Continued)
the majority continued downward) the evidence shows and the trial court found that the total market for watchbands sold by cross-petitioner declined in the years subsequent to 1956 (Ex. Vol., Defendant's Exhibits 1 and 2; Finding 14, App. C to Petition). The market for Gemex brand watchbands had similarly contracted, as shown by cross-respondent's own sales records (Ex. Vol., Defendant's Exhibits 11 and 12).

** The District Court found (Finding 20, App. C to Petition):

> "Plaintiff's projections of purchases and sales of Gemex watchbands for the fiscal years ending January 31, 1957 through January 31, 1961, are excessive and inaccurate."

president, was modified in only two respects. As the trial court found. (Finding 2(a), App. C to Petition):

> "The plaintiff's *prima facie* estimated loss figure of $56,475.95 must be reduced by (i) a sum attributable to payment of salesmen's commissions not otherwise credited against plaintiff's estimates of gross purchases from defendant to the extent of estimated sales for which such commissions would be payable; (ii) a sum attributable to excessive estimation of increase in plaintiff's gross sales income from Gemex watchbands."

The Court of Appeals affirmed the trial court's award of damages based upon these findings of fact. In so doing, the Court held that it was proper to test the projections of cross-petitioner's president against evidence of actual market occurrences during the period, and that the District Court's findings as to salesmen's commissions were not clearly erroneous. The Court of Appeals also found, on the basis of the record before it, that an award of $17,500.00 in attorney's fees to cross-petitioner would be reasonable and that the amount originally awarded by the District Court was excessive.

In its Cross-Petition for Writ of Certiorari, A. C. Becken Co., in essence, complains that these awards are inadequate, and urges this Court to review the evidence previously considered by the Courts below in making their determination. As to the award of damages, cross-petitioner asserts that both the District Court and the Court of Appeals placed undue emphasis on certain evidence relating to actual market conditions which was held to demonstrate that cross-petitioner's *prima facie* computation of damages was excessive and unrealistic. In connection with attorney's fees, cross-petitioner asks this Court to substitute its judgment for that of the Court of Appeals in making the award.

REASONS FOR DENYING THE CROSS-PETITION

There are no considerations which warrant review by this Court of the questions presented by the Cross-Petition. Cross-petitioner does not urge that the decision below is in conflict with decisions of this Court or with decisions of courts of other circuits. Nor does cross-petitioner argue that the courts below committed any fundamental error of law.

In each of the questions presented by cross-petitioner, the gist of the argument is that the courts below failed to properly evaluate the evidence in the record and that, accordingly, this Court should review what cross-petitioner characterizes as the "standard of proof" in such cases. It is submitted that these issues are largely factual, are peculiar to this individual case, and involve no questions of public policy.

The questions thus presented by the Cross-Petition are, at best, narrow ones which have uniformly been decided contrary to cross-petitioner's position in various federal courts which have had occasion to consider them.

I. The Courts Below Properly Tested Cross-Petitioner's Projections Of Anticipated Profits Against Evidence Of Actual Market Conditions.

Cross-petitioner contends that it was improper to consider evidence of actual occurrences and experience during the damage period in connection with the estimates of future damage introduced by cross-petitioner as proof of its *prima facie* case. Thus, cross-petitioner asserts that the courts below erred in weighing evidence which strikingly demonstrates that available markets for Gemex watchbands were steadily decreasing during the five year period following Gemex's refusal to deal on August 2, 1956 and that cross-petitioner's projections of its antici-

pated profits were inconsistent with such market experience.

To the same argument, the Court of Appeals said in part (App. D to Petition, page 27a):

> "While the evidence at the first hearing was a reliable basis for prognostication and was legally admissible to prove damage, no one can deny that to the extent future events modified its correctness, the entire evidence must be considered together."

The primary position advanced by cross-petitioner is the contention that the Courts below adopted some new "standard of proof". Cross-petitioner infers that this standard of proof departs in some way from settled principles and the policy of the anti-trust laws. Significantly, however, cross-petitioner cites no authority for the principles and policy from which the District Court and Court of Appeals are said to have departed. Indeed, it appears to be well-established in the anti-trust law that evidence of actual market conditions is proper to impeach opinion evidence as to loss of anticipated profits. *Clapper* v. *Original Tractor Cab Co.*, 7 Cir., 1959, 270 F.2d, 616; *Flintkote Co.* v. *Lysfjord*, 9 Cir., 1957, 246 F.2d 368; *cf. Bigelow et al.* v. *RKO Radio Pictures*, 1946, 327 U.S. 251.

Undoubtedly, litigants such as cross-petitioner will often find it convenient to ignore direct evidence of loss and to rely solely upon the estimates of expert witnesses to prove their damages. In those cases where a complaining litigant is entitled to assert his rights before the entirety of his losses have accrued, it is, of course, necessary that such losses be forecast on a reasonable basis.* But it is also

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* The Petition for Writ of Certiorari filed herein by The Gemex Corp. questions whether cross-petitioner is entitled to recover damages accruing after the filing of the complaint on the mere assumption that the refusal to deal would continue beyond the period alleged in the complaint. A resolution of this issue would render moot most of the factual questions posed in the Cross-Petition.

well-settled that courts are not barred in such cases from having the benefit of conditions occurring while the suit is pending to test such forecasts. Particularly apposite are the observations of Mr. Justice Cardozo in *Sinclair Refining Co.* v. *Jenkins*, 289 U.S. 689, 699, where this Court held that such subsequent evidence, if available, is proper:

> "Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within."

II. The Deduction For Commissions Paid On Mail Order Sales Was Computed On A Reasonable Basis And Is Not Clearly Erroneous.

Cross-petitioner also urges, as it did in the Court of Appeals, that the District Court erred in considering a deduction for commissions paid on mail order sales in its computation of damages.

The District Court found that cross-petitioner ordinarily paid a 10% commission on its sales of watchbands (Finding 4, App. C to Petition). On mail order sales, however, no such commission was paid unless the mail order was placed within a six month period following solicitation of the customer by cross-petitioner's salesmen. Under those circumstances, a 5% commission was customary (Finding 8(b), App. C to Petition). Finding that cross-petitioner had destroyed, within two years after filing this suit, the only records by which the exact amount of commissions paid on mail order sales could be computed, the District Court considered existing evidence and held that a deduction of 4.5% representing an average commission paid on all mail orders sales was proper (Findings 8 and 9, App. C to Petition).

The Court of Appeals, after considering the findings of fact discussed above, found that the District Court's deduction for mail order sales commissions was computed on a reasonable basis and did not involve a double deduction. The Court correctly held that cross-petitioner was not entitled to complain of uncertainties in such computation which resulted from its own wilful destruction of records after the filing of this suit, and that the District Court's findings were not clearly erroneous under Rule 52(a), F.R.C.P. (App. D to Petition, pp. 27a-29a).

The determination of the courts below on this question is amply supported by the record and provides no basis for review by this Court.

III. The Court of Appeals Properly Reduced the Award of Attorney's Fees

Finally, cross-petitioner asks this Court to review the standards applicable to a determination of reasonable attorney's fees in anti-trust litigation. It is submitted that, as the cases cited by cross-petitioner demonstrate, the subject of attorneys' fees is one which is peculiar to each individual case, and properly within the discretion of a court which is familiar with the history of the particular litigation. In the instant case, the Court of Appeals was in a position to evaluate the many factors which influence the amount of recoverable attorneys' fees and to determine, on the basis of such evidence, a reasonable award.

CONCLUSION.

There is no basis on which the Cross-Petition can be granted and, accordingly, we pray that it be denied.

Respectfully submitted,

EDWARD A. HAIGHT,
BRITTON A. DAVIS,
141 W. Jackson Blvd.,
Chicago 4, Illinois,
Attorneys for Petitioner-Cross-Respondent.

August 8, 1963.